

With respect to the restriction requirement, the Patent Office requires Applicants to elect one of two alleged inventions: I. Claims 1-6 and 8-10; or II. Claims 1 and 7. Applicants respectfully submit that this restriction, on its face, is improper. In this regard, the Patent Office is requiring a restriction between Claim 1 and Claim 1. Of course this is not possible. The test for whether or not a restriction is possible is whether or not there are independent and distinct inventions. MPEP § 803 states that “[u]nder this statute an application may be properly required to restrict to one of two or more claimed invention only if they are able to support separate patents. . .” Of course, Claim 1 cannot support two separate patents. In this regard, if Claim 1 were filed in two separate patents, each of the patents would be improper in view of the other patent for double patenting, i.e., they would have identical claims. Therefore, Applicants respectfully submit that the restriction is not proper and request that it be withdrawn. Regardless, Applicants elect, with traverse, Group I: Claims 1-6 and 8-10.

In addition to the restriction requirement, the Patent Office states the following:

In addition to the foregoing, applicants are required under 35 U.S.C. § 121 to elect a specie for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. A specie is a fully defined “dietary protein”. It should include information such as (a) the degree of hydrolysis, if the protein is hydrolyzed, (b) the lower limit on the weight percent of di and tri-peptides, if any, (c) if the protein is hydrolyzed, the source of protein (e.g., casein or whey protein) should also be specified; (d) the presence or absence of a carbohydrate and fat in the formulation should also be specified. In addition, in the event that Group I is selected, a specific “organ” or body part should be selected (e.g., intestine, duodenum, or jejunum).

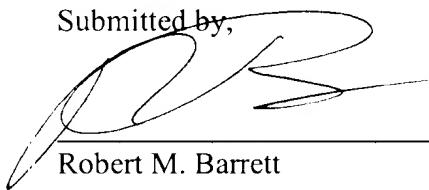
Applicants respectfully submit that this election of species requirement is not proper. Moreover, this election of species does not comport with Patent Office procedures and therefore makes it impossible for Applicants to respond to same. At the outset, it appears that what the Patent Office is attempting to do is not require an election of species requirement, but requiring Applicants to add limitations to the claims. For example, with respect to the dietary protein, Applicants do not

believe it is necessary to set forth all of the information that is set forth in the alleged election of species requirement. Indeed, to do so would require Applicants to limit the claimed invention to the specific embodiments set forth in the application which is not proper.

The MPEP requires, in making an election of species requirement, that the Patent Office: identify generic claims or indicate that no generic claims are present; clearly identified each of the disclosed species to which the claims are restricted – the species preferably identified as the species of Figures 1, 2, and 3, or the species of Examples I, II, and III respectively; and identify the claims to which the species apply. See MPEP § 809. The Patent Office has not followed any of these procedures. Indeed, there is no identification in the Office Action that any of the claims are drawn to any of the different species. In fact, the Patent Office has asked Applicants to elect a species with respect to, for example, what is the source of protein that is hydrolyzed, when not one of the claims even includes this limitation. Therefore, Applicants respectfully request that the election of species requirement be withdrawn. If not withdrawn, Applicants respectfully request that the Patent Office comply with Patent Office procedures and specifically identify the specific specie to be elected from identifying which claims relate to each of the species.

For the foregoing reasons, Applicants respectfully request that the restriction and election of species requirement be withdrawn. In the alternative, Applicants elect Group I with respect to the restriction requirement and respectfully submit that the Patent Office set forth with respect to the election of species requirement, the specific species to be chosen from and the claims that read thereon.

Submitted by,

A handwritten signature in black ink, appearing to read "RMB".

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